Supreme Court of the United States.

OCTOBER TERM, 1921.

No. [redacted]10

ST. CLOUD PUBLIC SERVICE COMPANY,

Appellant,

vs.

CITY OF ST. CLOUD,

Appellee.

Brief on Behalf of Appellee.

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TABLE OF CASES.

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STATEMENT OF CASE.

We desire to briefly summarize the issues, as we understand them, and to call attention to some additional facts.

Appeal from the Final Decree of the United States District Court, District of Minnesota, dismissing appellant's bill of complaint for want of equity.

Appellant's predecessor in interest, in the month of December, 1905, prepared, submitted and secured the passage of, contractual ordinance No. 160 of the City of St. Cloud, granting to it and its assigns, for the period of approximately thirty years, the privilege of supplying electricity and gas to the

City and its inhabitants, contracting for the construction of a gas plant and stipulating to the maximum rate of $1.35 per thousand cubic feet for fuel gas.

For fifteen years, appellant and its predecessor operated under this franchise, and, with the exception of a very brief period, furnished and supplied fuel gas at the maximum ordinance rate of $1.35 per thousand cubic feet.

Suit was brought by appellant wherein it claimed that the terms of the contractual ordinance fixing the maximum rate for gas were confiscatory and non-compensatory and a taking of the property of appellant without due process of law, in violation of the Federal Constitution. Appellant did not deny full acceptance of the terms of the contractual ordinance. It claimed that the City possessed no power to contract. It also claimed that the franchise ordinance, as to the maximum rate, was not contractual, but merely legislative in its terms.

The record shows that the gross earnings of appellant for the year ending December 31, 1918, were $323,722.99 (page 69); that its gross earnings for the year ending September 30, 1919, were $422,960.60, and its net earnings for that period were $194,196.57 (page 75); and that its gross earnings for the year ending September 30, 1920, were $603,358.68, and its net earnings for that period were $280,549.97 (page 69).

The bill of complaint admits that appellant operated its gas plant at a profit up to December 31,

1916 (page 8).

Appellant sought to increase its rate for fuel gas to $3.39 per thousand cubic feet.

Defendant filed motion to dismiss upon the following, among other, grounds:

1st. That it conclusively appears that the complainant is furnishing gas service to the defendant and its inhabitants in compliance with the terms of a contractual ordinance, limiting the maximum cost of fuel gas to the sum of $1.35 per thousand cubic feet of gas, and that complainant is bound by said contractual ordinance.

2nd. For want of equity in said action.

The trial Court denied the motion for injunction and granted the defendant's motion to dismiss upon the grounds stated above. The decision of the trial Court will be found at pages 142-161 of the record. Final Decree dismissing the bill of complaint was entered and plaintiff appealed to this Court.

SUMMARY OF ISSUES.

1. Did the City of St. Cloud have power, under its charter, to make this franchise contract?

2. At the time the contract was made, were there any existing provisions of the constitution of Minnesota prohibiting the delegation by the Legislature of the State, of power to make such contract covering maximum rates for service?

3. Was it error for the Minnesota District Court to determine and conclude that the statutes of Minnesota and the decisions of its Courts of last re-

sort, indicative of the policy of the State, coupled with the provisions of the charter of the City of St. Cloud, sustained the validity of the contract ordinance?

4. Is the language of Ordinance No. 160 contractual in form, or merely legislative?

POINT 1.

APPELLEE, UNDER ITS CHARTER, WHEREIN IT WAS INCORPORATED AS A CITY UNDER THE PROVISIONS OF CHAPTER 8, SPECIAL LAWS OF MINNESOTA FOR 1868, AND ACTS AMENDATORY THERETO, AS FINALLY CONSOLIDATED AND MERGED IN MINNESOTA SPECIAL LAWS OF 1889, CHAPTER 6, HAD FULL AND AMPLE POWER TO ENTER INTO A CONTRACT PROVIDING FOR THE MAXIMUM RATE FOR GAS, AS CONTAINED IN SECTION 6, OF CONTRACTUAL FRANCHISE ORDINANCE NUMBER 160.

St. Cloud was originally incorporated by a legislative act in 1862, as the Town of St. Cloud (Chapter 4, Special Laws of Minnesota, for 1862). It was provided with a town council form of government. To it was delegated all general powers possessed by municipal corporations at common law Various specific powers were also delegated. Subdivision 10, of Section 1, of Chapter 4 of these special laws, reads as follows:

"Tenth. To make and establish public

pounds, pumps, water cisterns and reservoirs, and to provide for the erection of water works, for the supply of water to the inhabitants, to erect lamps or other means whereby to light the town, to regulate and license hacks, cabs, drays, carts and charges of hackmen, coachmen, draymen and cartmen of the town."

The City of St. Cloud was incorporated, superseding the town, by Minnesota Special Laws of 1868, Chapter 28. By the terms of that chapter, the city, as a municipal corporation, was declared capable of contracting and being contracted with, possessing all of the general powers possessed by municipal corporations at common law, and in addition thereto "shall possess the powers hereinafter specifically granted, and the authorities thereof shall have perpetual succession."

Subdivision 11 of Section 3, Chapter 4 of said Special Laws included in the grant of special powers, reads as follows:

"Eleventh. To establish and construct public pounds, pumps, wells, cisterns, reservoirs, and hydrants; to erect lamps and provide for the lighting of the city, and to control the erection of gas works or other works for lighting the streets, public grounds and public buildings, and to create, alter and extend lamp districts; to regulate and license hacks, carts, omnibusses and the charges of hackmen, draymen, cab men and omnibus drivers of the City."

Amendments to this act of incorporation of the City, passed by the Legislature in the form of special legislative acts, were as follows:

Special Laws of 1869, Chapters 9, 10 and 11.

Special Laws of 1874, Chapter 20.
Special Laws of 1875, Chapter 104.
Special Laws of 1876, Chapter 38.
Special Laws of 1878, Chapter 46.
Special Laws of 1885, Chapter 12.
Special Laws of 1887, Chapters 115 and 178.

The Supreme Court of Minnesota, in many decisions hereinafter cited, repeatedly held that the constitutional amendment of November 8, 1881, did not bar or forbid the amendment and consolidation by the Legislature of special laws enacted prior to the adoption of that constitutional amendment.

Then followed the enactment of Chapter 6, Minnesota Special Laws of 1889, entitled:

> "An Act to Consolidate in one Act the Charter of the City of St. Cloud, and to amend the same."

This act contains no repealing clauses.

Section 1 of this act reads as follows:

> Section 1. The act entitled "An Act to reduce the act incorporating the town of St. Cloud, and to repeal a former charter of said town, approved March eighth (8th) eighteen hundred and sixty-two (1862), and the several acts amendatory thereto in one act, and to amend the same, and to incorporate the City of St. Cloud," approved March sixth (6th), eighteen hundred and sixty-eight (1868), and the several acts amendatory thereof, are hereby consolidated and reduced to one act, and amended so as to constitute the charter of the City of St. Cloud, which shall read as follows.

PERTINENT PROVISIONS OF THE AMENDATORY ACT, CHAPTER 6, SPECIAL LAWS OF 1889.

Section 1. Chapter 1 (page 132, Special Laws 1889) provides for the incorporation of the territory mentioned, as a municipal corporation, under the name of City of St. Cloud, and, among other powers, declares that the city—

> "* * * shall be capable of contracting and being contracted with, and shall have all the powers possessed by municipal corporations at common law, and in addition thereto, shall possess all powers hereinafter granted; and all the authorities thereof shall have perpetual succession."

Section 1 contains the general welfare clause.

Section 5 reads, in part, as follows (page 144, Special Laws of 1889):

> "The common council shall have full power by ordinance: * * *
>
> 10. To make and establish pounds, wells, cisterns, hydrants, reservoirs, and fountains, and to provide for and conduct water into and through the streets, avenues, alleys and public grounds of the city; and to provide for and control the erection of water works in said city, for the supply of water for said city and its inhabitants; and to grant the right to one or more private companies or corporations to erect and maintain water works for such purpose, and to authorize and empower such companies or corporations to lay water pipes and mains into, through, and under the streets, avenues, and public grounds of the city. And when necessary for carrying out the purpose of said

companies or corporations, to appropriate private property in said city to the use of said companies or corporations in the manner provided in this charter, for the appropriation of private property for public use; and to control the erection and operation of such water works, and the laying of such pipes and mains IN ACCORDANCE WITH SUCH TERMS AND CONDITIONS AS MAY HAVE BEEN HERETOFORE OR SHALL BE HEREAFTER AGREED UPON BETWEEN SAID CITY AND SAID CORPORATIONS OR COMPANIES. TO PROVIDE FOR AND CONTROL THE ERECTION AND OPERATION OF GAS WORKS, ELECTRIC LIGHTS, OR OTHER WORKS OR MATERIALS FOR LIGHTING THE STREETS AND ALLEYS, PUBLIC GROUNDS, AND BUILDINGS OF SAID CITY, AND SUPPLYING LIGHT AND POWER TO SAID CITY AND ITS INHABITANTS, AND TO GRANT THE RIGHT TO ERECT, MAINTAIN AND OPERATE SUCH WORKS, WITH ALL RIGHTS INCIDENT OR PERTAINING THERETO, TO ONE OR MORE PRIVATE COMPANIES OR CORPORATIONS, and to control the erection and operation of such works and laying of pipes, mains and wires into, through and under the streets, avenues alleys, and public grounds of said city, and the erection of poles and mainstays, and the stringing or wires thereon, over, in, upon, and across the streets, alleys and public grounds; to provide for and control the erection and operation of works for heating the public buildings of said city by steam, gas, or other means, and supplying light and heat and power to the inhabitants of said city: TO GRANT THE

RIGHT TO ERECT SUCH WORKS AND ALL INCIDENT RIGHTS TO ONE OR MORE PRIVATE COMPANIES OR CORPORATIONS, AND TO CONTROL AND REGULATE THE ERECTION AND OPERATION OF SUCH WORKS, and the laying of mains into, through and under the streets, alleys, and public grounds of said city; provided, that every grant to a company or corporation of the right to erect or maintain any of said works shall provide that the city or its successor may purchase the same at such time and in such manner as shall be prescribed in the grant; AND PROVIDED FURTHER, THAT THE COMMON COUNCIL SHALL HAVE AUTHORITY TO REGULATE AND PRESCRIBE THE FEES AND RATES AND CHARGES OF ANY AND ALL COMPANIES HEREINBEFORE MENTIONED."

"34th. To regulate and control the quality and measurement of gas. To prescribe and enforce rules and regulations for the manufacture and sale of gas, the location and construction of gas works, and the laying, maintaining and repairing of gas pipes, mains and fixtures, to provide for the inspection of gas and gas meters, and to appoint an inspector if needed, and prescribe his duties."

Chapter 14, Section 7, reads as follows:

"No law of the state concerning the provisions of this act, shall be considered as repealing, amending, or modifying the same, unless said purpose be expressly set forth in such law."

From the foregoing provisions of its charter, it is clear that the city had the following powers expressly granted:

1. To erect and operate gas or electric works of its own to supply light and power to the city and its inhabitants;

2. To grant the right to one or more private companies to do these things, and to control the erection and operation by said grantee;

3. To erect and operate works of its own for heating by steam, gas, or other means, to supply heat and power to the city and its inhabitants;

4. To grant the right to one or more private companies to do these things and to control and regulate the erection and operation by said grantee;

5. To purchase from any company such works erected and operated by it;

6. To regulate and prescribe the fees, rates and charges of all such companies;

7. To regulate and control the quality and measurement of gas;

8. To prescribe and enforce rules and regulations relative to the location of gas works, and regulations relative to the location of gas works and their construction; relative to laying, maintaining and repairing of pipes; relative to the manufacture and sale of gas; and to provide for inspection of gas and gas meters.

It is significant that in subdivision 10, of Section 5, the following language authorizing agreements with respect to the laying of pipes and mains for water supply, and extending to all corporations or companies, appears:

"IN ACCORDANCE WITH SUCH TERMS AND CONDITIONS AS MAY HAVE BEEN

HERETOFORE OR SHALL BE HEREAFTER AGREED BETWEEN SAID CITY AND SAID CORPORATIONS OR COMPANIES."

Section 10 deals with all of the important classes of public service, water, electricity, gas and heat. Power was delegated to grant the right to erect such works, and all incident rights, to one or more private companies or corporations, and to control and regulate the erection and operation of such works. Furthermore, the common council was expressly given authority to prescribe the fees and rates and charges of any and all of such companies. Upon the passage of the ordinance, the grantee proceeded to conform to its terms and constructed a new gas plant. No restraint was embodied in this ordinance in respect to the rates or charges for electric current. This was the point in which the grantee was particularly interested. Its success in securing this ordinance, bound it and its successors to the erection and operation of an efficient coal gas generating plant, of ample capacity as stipulated in the ordinance, and to the manufacturing and offering for sale, to the city and its inhabitants, of said supply of fuel gas at the rate of not to exceed $1.35 per thousand cubic feet. Such was the consideration that passed to the city for the granting of the franchise ordinance covering the grantee's electrical and gas business to be conducted in St. Cloud.

The grantee, on August 17, 1915, assigned and transferred Ordinance No. 160, and all rights there-

under, to appellant (Sub. A, Section 3 page 31, Record).

No question was made, and we submit none could have been made, as to the complete acceptance of this ordinance by the appellant's predecessor in interest and by the appellant itself.

In 1919, appellant declared:

> "The franchise in St. Cloud was granted in December, 1905, for a period of thirty years * * * and is favorable in every way" (page 77).

In 1920, a similar declaration was made (page 71).

Appellant's predecessors, with precisely the same executive management, as well as corporate ownership, prepared, presented to the council, and solicited the passage of this ordinance. Its attorney appeared before the council and urged its passage (Record, page 81). Wide publicity was given to the benefits of this contractual ordinance by the grantee. Written acceptance was unnecessary. It accepted the terms, rendered the service, received the returns for many years, and now attempts to repudiate but one provision of its contract.

City Railway Company v. Citizens Street R'y. Co., 166 U. S. 557-568, and cases cited.

Bank of U. S. v. Dandridge, 25 U. S., 12 Wheat., 64-70.

McQuillan, Vol. 4, Sec. 1650, page 3467.

Columbus Railway Power & Light Co., v. City of Columbus, 249 U. S., 399-412.

City of Red Wing v. Wisconsin-Minnesota Light and Power Co., 139 Minn., 240.

Ordinance No. 160.

Ordinance No. 160 was duly passed by the common council of the City of St. Cloud, on December 18th, 1905. It was duly approved by the Mayor of the City on the following day (page 5).

The ordinance in question reads as follows:

"Ordinance No. 160.

An Ordinance Granting the Right to Acquire, Construct, Maintain and Operate Works for the Production, Manufacture and Sale of Electricty and for the Manufacture and Sale of Gas in the City of St. Cloud, Minnesota.

The Common Council of the City of St. Cloud do Ordain:

Section 1. That the right and privilege is hereby granted to the Public Service Company of St. Cloud, Minnesota, to acquire, construct, maintain and operate in the City of St. Cloud, Minnesota, works and instrumentalities for the production, manufacture, distribution and sale of electricity for illuminating, power, fuel and other purposes, and for the manufacture, distribution and sale of gas for illuminating, power, fuel and other purposes, and for that purpose to erect and maintain in all the streets, avenues, alleys and public places of the City of St. Cloud, such poles, wires and cables as may be necessary for the purpose of the manufacture, distribution and sale of electricity, and to lay down in any of the streets, avenues, alleys and public places in said City of St. Cloud such mains and service connections as may be necessary in the distribution and sale of gas for the purposes aforesaid.

The rights, privileges and franchises hereby granted shall expire on the first day of December, A. D. 1935.

Section 2. The grantee named in Section One of this ordinance is hereby authorized to produce, manufacture and vend electricity for lighting, fuel, power and other purposes and to manufacture and vend gas for light, fuel and other purposes to the City of St. Cloud and the inhabitants thereof for and during the period aforesaid.

Section 3. That the said grants shall vest in said grantee full power and license to make all necessary erections and excavations necessary for the purposes aforesaid under the direction of the City Engineer, but the same shall be done with due and reasonable dispatch and diligence and with the least practicable inconvenience to or interference with the rights of the public and individuals, and the said grantee shall restore all streets, alleys, sidewalks and public places where excavated by it to their original condition as far as practicable, and all damages done by such excavation shall be repaired by such grantee, and in case any obstructions caused by such excavations shall remain longer than twenty-four hours after notice to remove the same, or in case of neglect on the part of said grantee to protect any dangerous places by proper guards, then the said city may remove or protect the same at the cost of said grantee.

Section 4. That in laying down pipes or erecting wires, said grantee shall conform to all reasonable regulations prescribed by said city to prevent unnecessary injury to the streets, alleys, sidewalks and public places, and shall not interfere with or injure any water pipes, drains or sewers of said city.

Section 5. In consideration of the rights and privileges herein granted, the grantee hereby covenants and agrees that it will prior to the

first day of January, A. D. 1907, erect or cause to be erected in the City of St. Cloud an efficient coal gas generating plant or system of ample capacity, and after the erection thereof will manufacture and offer for sale to the city and its inhabitants coal gas of at least fourteen candle power, and in the meantime will furnish gas from the present gas works of the grantee of the standard now manufactured therein.

Section 6. The grantee is authorized hereby to sell illuminating gas when the works therefor shall have been completed, of a standard of fourteen candle power at the price of not to exceed one dollar and 85/100 ($1.85) per thousand cubic feet, and fuel gas at the rate of not to exceed one and 35/100 dollars ($1.35) per thousand cubic feet, and the grantee shall be at liberty to cut off the supply from any person failing or refusing to pay for gas furnished for a period of thirty days."

Section 7, of the ordinance, provides for purchase by the City, of the electric and gas works of the grantee on the 1st day of January, 1911, and at five year intervals thereafter, at an appraised value to be determined as provided.

Section 8, of the ordinance, states that the grantee named in the ordinance shall mean the Public Service Company of St. Cloud, Minnesota, or its successors and assigns.

Many cases decided by this Court, are collected by the respective authors, in support of the following statements of the law:

"Restrictions, limitations or conditions relating to and regulating rates have a proper relationship to the subject matter of the grant,

and may, under proper legislative authority, be made a matter of stipulation in connection therewith. A maximum rate prescribed by the ordinance, when it is made a condition of the franchise, is binding upon the grantee of the franchise, and it cannot escape therefrom."

Dillon (Fifth Ed.), Sec. 1328.

"Accordingly, where a municipality grants the right to use streets for gas pipes, it may provide that the charge for gas furnished the city and its inhabitants shall not exceed certain prices, without regard to whether the municipality has power to regulate the rates of the company."

McQuillan, Vol. 4, Sec. 1738, p. 3719.

In the case of *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 497, the ordinance provided that the grantees, their associates or assigns, should have the right * * * to make such rates and charges for the use of said water as they may determine, provided that such rates and charges shall not exceed fifty cents for each thousand gallons of water.

Held sufficient to create a contract.

In *Columbus Railway Power & Light Co. v. City of Columbus*, a rate of fare of eight tickets for twenty-five cents, with universal free transfers, upon a street railway, constitutes in Ohio, when accepted by the grantee, a valid contract mutually binding for the period named.

In the case of *City of Cleveland v. Cleveland City Railway Co.*, 194 U. S. 517, the ordinance provided:

"The said Company shall not charge more

than five cent fare each way for one passenger over the whole or any part of said line, etc."

Held a contract.

In *Milwaukee Electric, etc. Co. v. Railroad Commission of Wisconsin,* 238 U. S. 174, an ordinance providing for a rate of fare * * * not to exceed five cents for a single fare, etc., held a contract.

In *City of Cleveland v. Cleveland Electric Ry. Co.,* 201 U. S. 529, the ordinance provided:

"and that for a single fare from any point to any point on the lines and branches of the consolidated road no greater charge than five cents shall be collected, etc."

Held a contract, the impairment of which was permanently enjoined.

In *Cedar Rapids Gas Light Co. v. Cedar Rapids* 223 U. S. 667, the franchise ordinance provided:

"In consideration of the privileges herein granted to said Company, it shall furnish to the inhabitants of said city gas for lighting at a price not to exceed $1.80 per thousand feet, etc."

Held a promise by the company based on a consideration, and that under the code of Iowa the stipulation was subject to the power retained by the city to regulate.

In *Knoxville Gas Co. v. City of Knoxville,* 261 Fed. 283, the ordinance in question provided:

"Also to furnish gas of a given candle power to consumers within the city at a price of not more than $1.10 per thousand cubic feet."

It was held that the language in question was sufficient to create a contract.

In the San Antonio case, 257 Fed. 467, an ordinance case, the ordinance provided:

> "Said Street Car Company shall charge five cents fare for one continuous ride," etc.

Held sufficient to constitute a contract, but that the city possessed no power to make same.

In *Muncie Natural Gas Co. v. City of Muncie*, 66 N. E. (Ind.) 436, 60 L. R. A. 822, the ordinance contained a proviso to the effect that the total cost of gas to consumers for private purposes should not exceed a certain schedule. This was held sufficient to create a contract.

In *Omaha Water Co. v. Omaha*, 77 C. C. A., 267; 147 Fed. 1, a case removed upon appeal to this Court, but wherein the appeal was dismissed, the ordinance in question provided that water should be furnished to private consumers at rates not exceeding the rate set forth in the ordinance, and as the company and the consumers might agree upon.

Held a contract.

The Court say:

> "Any reduction of these rates necessarily impairs the obligation of this contract, etc. * * * The order of the water board which attempts to reduce the agreed rates impairs the obligation of this contract."

Indiana and Missouri cases are cited in support of the following text in R. C. L., Vol. 12, p. 899:

> "For example, where the Gas Company has accepted an ordinance prescribing maximum rates and has installed its plant thereunder, the municipality is without power to fix any

schedule of maximum rates. The first ordinance, after acceptance, amounts to a contract and cannot be altered at the instance of one party thereto."

DECISIONS OF THE FEDERAL COURT SITTING IN MINNESOTA, AND OF THE SUPREME COURT OF THE STATE OF MINNESOTA.

In each of the following cases, the validity of Minnesota franchise contracts, containing provisions fixing and limiting maximum rates to be charged for service, or, in lieu thereof, contractual resort to arbitration, as provided by the terms of the ordinance, was upheld. For the sake of brevity, we will merely cite them now. We will endeavor to fully present these decisions of the Minnesota Courts under Point Three of this brief.

Anoka Water Works, etc., Co. v. City of Anoka, 109 Fed. 580.

City of Moorhead v. Union Light and Power Company, 255 Fed. 920.

Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 586.

Reed v. City of Anoka, 85 Minn., 294.

City of St. Cloud v. Water, Light and Power Co., 88 Minn. 329.

City of Red Wing v. Wisconsin-Minnesota Light and Power Co., 139 Minn., 240.

City of Duluth v. Duluth Street Ry. Co., 145 Minn., 55-59.

PERMISSIVE CONTRACTS.

Permissive contracts and their validity, are recognized in numerous Federal and State Court decisions. Although a city had no express power to make an inviolable rate contract, such contracts are, nevertheless, binding on the parties until abrogated or altered by the legislature, directly or through a duly authorized commission.

Puget Sound Co. v. Reynolds, 244 U. S., 574.

Worcester v. Railway Co., 196 U. S. 539-552.

Milwaukee Ry. Co. v. Wisconsin R. R. Commission, 238 U. S. 174.

Omaha Water Co. v. City of Omaha, 147 Fed. 1.

Muncie Ind. Gas Co. v. Muncie, 160 Ind., 97; 60 L. R. A., 822.

City of Manitowoc v. Manitowoc Etc. Co., 129 N. W., 925.

Traverse City v. Michigan R. R. Commission, 168 N. W. 481.

Permissive contracts are recognized in Minnesota.

In *City of Red Wing v. Wisconsin-Minnesota Light and Power Company, supra*, the Supreme Court of Minnesota recognized the validity of permissive contracts between a municipality and a public service corporation, even in the absence of express power to make a rate contract, or to grant a franchise, or prescribe rates.

The only power delegated to Red Wing was au-

thority "to erect lamps or other means whereby to light the City." The ordinance provided for arbitration of rates at fixed intervals. The Supreme Court sustained the contract.

The Court say:

> "It is not questioned, and could not well be, that in a franchise ordinance rates and the manner of fixing them, both for the City and its inhabitants, could be provided for, subject to the right of subsequent legislative interference."

Appellee had power to make this contract.

No Public Utility or Public Service Commission in Minnesota.

Minnesota has never had a public utility or public service commission, or kindred body, clothed with power to supervise or regulate the business methods or management of, or fix, determine, or adjust, the rates of service of gas, electric or water companies engaged in the public service. In the absence of such a commission, and of such supervising authority, the cities and villages of Minnesota have uniformly, both before and since the constitutional amendment of November 8, 1892, provided for this service under their own franchise ordinances and contracts, and in the exercise of their administrative and business powers.

Such being the situation, it followed that there was, from the beginning of statehood, not only widespread and complete delegation of power to

the cities and municipalities of the State, but there was recognition, in the general statutes of the State, of the authority of the municipalities to impose upon public service corporations, in franchises granted, such conditions and restrictions as might be named.

Section 6137, G. S. 1913, found at Section 2842 Revised Laws of 1905, and originating in Chapter 19, Minnesota Laws of 1895, reads as follows:

> "6137. STATE AND LOCAL CONTROL—The state shall at all times have the right to supervise and regulate the business methods and management of any such corporation (public service corporations), and from time to time to fix the compensation which it may charge or receive for its services; *and every such corporation obtaining a franchise from a city or village shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality.*"

While there is reserved, under this old section of the Statutes of Minnesota, the right of state supervision and regulation, that right in respect to the matter of the fees and charges of public service corporations, rendering to municipalities electrical, gas and water service, HAS NEVER BEEN EXERCISED BY THE STATE.

On the contrary, *except in cases where there were contract obligations or franchise provisions existing between any city and any such public service corporation furnishing gas or electric current*, all cities of the third and fourth classes in Minnesota, were, by the provisions of Chapter 469, Laws of Minne-

sota of 1919, authorized to prescribe a rate for such service.

This legislative act is fully set out at pages 10-13 of Appellant's Brief.

The EXCEPTION in the act, being a portion of Section 1 thereof, reads as follows:

> "Provided that nothing herein shall be construed to impair the obligation of any contract or franchise provision now existing between any such city and any such public service corporation."

It is clear that the legislature not only omitted to recall power theretofore conferred, but expressly protected and safe-guarded contracts and franchise provisions then existing.

Appellant made application, under the terms of this statute, for the fixing of rates for gas service. It asked nothing so far as rates for electrical current were concerned. There was present in the law this express exception. The petition was not entertained by the City Commission, but was returned to the appellant.

Were Minnesota, in the future, to revolutionize her public policy with respect to local control of public service corporations furnishing electric, gas and water facilities, and provide a State Public Utility or Public Service Commission, with wide powers to fix, determine and adjust rates for such public service, still, appellee, would be secure in the possession of this franchise contract, at least until such commission had expressly found that the rates were "unjust, unreasonable, unjustly dis-

criminatory or unduly preferential."

Such was the very recent declaration of this Court in the case of

Wichita Railroad & Light Co. v. Public Utilities Commission of Kansas, U. S. Adv. Ops. 1922-23, page 52.

POINT 2.

THE AMENDMENTS TO THE CONSTITUTION OF MINNESOTA, ADOPTED NOVEMBER 8th, 1881, AND NOVEMBER 8th, 1892, EXPRESSLY PROTECTED EXISTING SPECIAL LEGISLATIVE CHARTERS. THE FIRST AMENDMENT, AS INTERPRETED BY THE MINNESOTA SUPREME COURT, DID NOT BAR, BETWEEN 1882 AND 1892, THE AMENDMENT OF EXISTING CHARTERS BY THE STATE LEGISLATURE. ST. CLOUD'S CHARTER OF 1889, SPECIAL LAWS, CHAPTER 6, WAS AN ACT CONSOLIDATING AND REDUCING TO ONE ACT, ITS CHARTER OF 1868, AND ACTS AMENDATORY THEREOF, AND AMENDING THE SAME. THE LEGISLATURE OF THE STATE HAD FULL AND UNIMPAIRED POWER TO ENACT THESE AND SIMILAR LAWS.

The constitutional amendment of November 8, 1881, as amended November 8, 1892, did not deprive the appellee of its right, under its charter, to

contract as it did, under the terms of Ordinance No. 160.

There are specific exceptions in these constitutional amendments, to which attention is not directed by appellant, as hereinafter more fully discussed. Moreover, as we shall show, that the settled public policy of Minnesota, as reflected in its legislation and in the decisions of its courts of last resort, as well as subsequent constitutional amendments substituting, at the will of the muncipalities, home rule charters for special legislative charters, clearly sustains the validity of appellee's charter powers, as exercised by it in the passage of Ordinance No. 160.

Constitutional Amendment of November 8, 1881.

The constitutional amendment of November 8, 1881, proposed by Chapter 3, General Laws for 1881, found at pages 21 and 22 of Minnesota Laws for that year, provided as follows:

> "Sec. 33. The legislature is prohibited from enacting any special or private laws in the following cases:
>
> 7. For granting corporate powers or privileges, EXCEPT TO CITIES.
>
> 10. For granting to any individual, association or corporation, except municipal, any special or exclusive privilege, immunity or franchise whatever.
>
> But the legislature may repeal any existing special law relating to the foregoing subdivision."

As has been shown, St. Cloud, at the time of

the adoption of the 1881 constitutional amendment, was operating as a city, under its 1868 charter. The legislative power to amend this charter and to consolidate the various legislative enactments under which it had operated, was provided for in the constitutional amendment of 1881. The existence of such power was repeatedly recognized in numerous decisions of the Supreme Court of Minnesota, decided after the adoption of the constitutional amendment of 1881. Some of these cases present situations with respect to the previous organization of boom companies and street railway companies; some refer to questions in relation to the incorporation of villages; *but in none of these decisions was the right of the legislature questioned with regard to the exercise of power to alter, or amend, or consolidate into a single special act, prior special municipal charters. That right was expressly declared as continuing after 1881 and until 1892.*

These cases are as follows:

Green v. Knife Falls Boom Company, 35 Minn. 155.

State v. Spaude, 37 Minn. 322.

Lake v. Minnesota, 38 Minn. 366.

Minnesota Loan and Trust Company v. Beebe, 40 Minn. 7.

State v. Sheriff, 48 Minn. 236.

State v. Beck, 50 Minn. 47.

State v. Village Council of Cloquet, 52 Minn. 9.

State v. Porter, 53 Minn. 279.

City of Duluth v. Duluth Street Ry. Co., 60 Minn. 178.

Brady v. Moulton, 61 Minn. 185.
State v. Wisnell, 61 Id. 465.

In *Brady v. Moulton, supra*, the validity of Special Laws of 1891, Chapter 175, authorizing a village in the state to issue bonds for waterworks, was questioned. The Court sustained the validity of this special act, holding it was a grant of corporate powers or privileges, within the meaning of the constitutional provision referred to.

> "The constitutional amendment of 1881 was, with certain changes, not material here, copied bodily from the constitutional amendment of 1871 in the state of Wisconsin, subdivision 7 (the one here involved) being verbatim subdivision 7 of the amendment of 1871 in that state. In 1874—seven years before we adopted it—this subdivision had been construed by the Supreme Court of Wisconsin as relating only to acts of incorporation thereafter to be granted, and as not impairing the legislative power of alteration or repeal in respect to charters granted prior to the adoption of the constitutional amendment. *Attorney General v. Railroad Cos.*, 35 Wis. 425, 560. In that case, Chief Justice Ryan, speaking for the court, said: We feel bound to hold, and find no difficulty in holding, the phrase in the amendment, 'to grant corporate powers or privileges,' to mean 'in *principio Donationis*,' and equivalent to the phrase, 'to grant corporate charters.' This is implied not only in the word 'grant,' but also by the word 'corporate.' *A franchise is not essentially corporate; and it is not the grant of franchise which is prohibited, but of corporate franchise,—that is, as we understand it, franchise by act of incorporation.*

This construction has been uniformly adhered to by the courts of that state. From 1881 down to the adoption of the much more sweeping and radical amendment of 1891, the legislature of this state assumed and acted upon the same construction. The acts are very numerous amending by special law the special charters of villages organized prior to 1881. Large interests are doubtless now dependent upon the validity of such legislation. To now declare it invalid would result in very serious consequences. In view of these facts, we are of opinion that, whether this construction, considered as a new question, is right or wrong, it ought now to be followed and adhered to. An additional reason for such conclusion is the fact that such a construction can only affect the past, inasmuch as the amendment of 1881 on the subject of special legislation has been superseded by the more sweeping one of 1891, adopted in November, 1892. It is also significant that in subdivision 10 of the amendment of 1881 prohibiting the enactment of special laws incorporating any town or village there were omitted the words (found in the Wisconsin amendment), 'or to amend the charter thereof.' Our conclusion, therefore, is that Sp. Laws 1891, c. 175, authorizing the defendant village to issue these bonds, was not a grant of a corporate power or privilege, within the meaning of the constitutional amendment of 1881."

In *State v. Wiswell, supra,* the court held that the constitutional amendment of 1881 "did not impair the legislative power of alteration or repeal in respect to charters granted prior to the adoption of the constitutional amendment, etc."

In this case another village in the state was concerned whose incorporation was provided by Special Laws of 1881, Chapter 46, and amended after the adoption of the 1881 amendment, by Special Laws of 1885, Chapter 30.

In *State v. Porter, supra*, the Supreme Court considered the validity of the act of amendment and consolidation of the charter of the City of Mankato, passed in 1887 by the Minnesota legislature. (See Special Laws of 1887, Chapter 8.) The Court declared this act as really a new charter for the city. Mankato was incorporated originally long prior to the year 1885. A Municipal Court in the city of Mankato was established by Special Laws of 1885, Chapter 119. The Court used the following language:

> "That such an act might be styled as amendatory of the charter, or might be made a part of the city charter, either originally or by legislation subsequent to the granting of corporate powers, we do not now question, etc."

In *Green v. Knife Falls Boom Company, supra*, the Court considered the question of the validity of the legislative charter granted to the Knife Falls Boom Company. The Court say:

> " * * * the strict rule forbidding the granting of additional powers or franchises, while it may be the more logical and satisfactory, treated as an original question, has never in fact been recognized or adopted by the legislature or courts of the state; that this additional provision was open to construction and, during a long course of legislation, the prac-

tical construction placed upon it by the legislature and people has been a liberal one in respect to amendments, and that the court should be very slow to change it, at this late day, for the reason that the extensive and valid legislation affecting corporate charters, so long continued, has come to involve very large public and private interests."

From 1881, to and including the legislative session of 1891, the flood of special legislation continued. Prior to 1881, practically all of the cities of size or consequence in the State, had secured, and were operating under, special legislative charters. During the last two sessions of the legislature, immediately previous to the adoption of the constitutional amendment of 1892, prohibiting further special legislation, more than one thousand special acts were passed, most of which were consolidations or amendments of previous acts. The consideration of general, constructive legislation was hampered.

An examination of the special laws of Minnesota has been made. It is safe to say that the number of special charters granted to cities and villages of the State, during the forty years from the cessation of territorial days, down to 1892, runs into the hundreds, and the number of amendatory and consolidation acts, into the thousands. Minneapolis, the largest city in the State, is still operating under its legislative charter and amendments thereto.

THE CONSTITUTIONAL AMENDMENT OF 1892.

This amendment reads as follows:

"Sec. 33. PROHIBITION OF SPECIAL LEGISLATION (As amended November 8, 1892).

In all cases when a general law can be made applicable no special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law regulating the affairs of, or incorporating, erecting or changing the lines of any county, city, village, township, ward or school district, or creating the offices, or prescribing the powers and duties of the officers of, or fixing or relating to the compensation, salary or fees of the same, or the mode of election or appointment thereto; authorizing the laying out, opening, altering, vacating or maintaining roads, highways, streets or alleys; remitting fines, penalties or forfeitures; regulating the powers, duties and practice of justices of the peace, magistrates and constables; changing the names of persons, places, lakes or rivers; for opening and conducting of elections, or fixing or changing the places of voting; authorizing the adoption or legitimation of children; changing the law of descent or succession; conferring rights upon minors; declaring any named person of age; giving effect to informal and invalid wills or deeds, or affecting the estates of minors or persons under disability; locating or changing county seats; regulating the management of public schools, the building or repairing of school houses, and

the raising of money for such purposes; exempting property from taxation, or regulating the rate of interest on money; creating corporations, or amending, renewing, extending or explaining the charters thereof; granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever, or authorizing public taxation for a private purpose. *Provided, however, That the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated.*

The legislature may repeal any existing special or local law, but shall not amend, extend or modify any of the same.

1. This amendment, by its own terms, expressly recognized and continued in force, all special charters of municipalities within the State of Minnesota.

2. It did not operate to suspend or repeal any of them.

3. The power to repeal special or local laws was placed with the legislature, but the power to amend, extend or alter the same was terminated.

The prohibition in the constitutional amendment of 1881, from enacting any special or private laws, granting to any individual, association or corporation, *except municipal*, any special exclusive privilege, immunity or franchse whatever, was intended to bar grants to corporations or individuals constituting acts of incorporation. Neither the constitutional amendment of 1881, or that of 1892, was intended to effect previous delegations of power to municipalities.

A contract for gas or water creates no special privilege or immunity contravening constitutional provisions of Minnesota.

Brady v. Moulton, 61 Minn. 185.

Citing *Attorney General v. R. R. Co.'s*, 35 Wis. 425-560.

Omaha Water Co. v. City of Omaha, 147 Fed. 1.

For additional authority reference is made to the numerous Minnesota Supreme and Federal Court cases cited under Point 3.

HOME RULE CHARTERS, UNDER CONSTITUTIONAL AMENDMENTS AND LEGISLATIVE ENABLING ACTS, WERE PROVIDED AS A SUBSTITUTE FOR SPECIAL CHARTERS AND SPECIAL LEGISLATION, WITH ALL SPECIAL CHARTERS RETAINED IN FULL FORCE UNTIL EXPRESSLY REPEALED BY THE LEGISLATURE, OR RENDERED INOPERATIVE BY HOME LEGISLATION, EMBODIED IN HOME RULE CHARTER PROVISIONS.

The constitution of Minnesota was amended November 3, 1896, and further amended November 8, 1898. There was embodied therein Section 36 of Article 4, which provided for the adoption of home rule charters by cities and villages.

Section 36, Article 4, of the constitution reads, in part as follows:

> "Any city or village in this state may frame a charter for its own government as a city, consistent with, and subject to, the laws of this state etc. * * *
>
> Before any city shall incorporate under this

act, the legislature shall prescribe by law the general limits within which such charter shall be framed."

The act further provided for the classification of the cities of the state on the basis of population.

The legislative enabling act is found at Section 1345, General Statutes of Minnesota for 1913, originally enacted as Chapter 238, Minnesota Laws of 1903.

Section 1345 reads, in part, as follows:

> "Subject to the limitations in this chapter provided, it may provide for any scheme of municipal government not inconsistent with the constitution, and may provide for the establishment and administration of all departments of the city government, and for the regulation of all local municipal functions, as fully as the legislature might have done before the adoption of Sec. 33, Art. 4, of the constitution. It may adopt provisions in reference to, or contained in, special laws then operative in said city or village, and provide that such laws, or such parts thereof as are specified, shall continue in force therein."

In respect to the range of these complete powers of local self-government, the Supreme Court of Minnesota, in the case of *Grant v. Berrisford*, 94 Minn., 45, decided December 30, 1904, declared:

> "But it (the constitution) does not forbid the adoption of charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may differ in details from those of existing general laws. THIS IS NECESSARILY SO, FOR OTHER-

WISE EFFECT COULD NOT BE GIVEN TO THE CONSTITUTIONAL AMENDMENT WHICH FAIRLY IMPLIES THAT THE CHARTER ADOPTED BY THE CITIZENS OF THE CITY MAY EMBRACE ALL APPROPRIATE MUNICIPAL LEGISLATION, AND CONSTITUTE AN EFFECTIVE MUNICIPAL CODE, OF EQUAL FORCE AS A CHARTER GRANTED BY A DIRECT ACT OF THE LEGISLATURE."

This declaration is the settled law of the state.

Peterson v. City of Red Wing, 101 Minn. 62.

Turner v. Snyder, 101 Minn. 481-482.

American Electric Co. v. Waseca, 102 Minn. 329-334.

State v. Board of Water and Light Commissioners, 105 Minn. 472-475.

Schigley v. Waseca, 106 Minn. 94-101.

Thune v. Hetland, 114 Minn. 395-397.

City of Duluth v. Orr, 115 Minn. 267-269.

Hjelm v. City of St. Cloud, 129 Minn. 240-242.

State v. International Falls, 132 Minn. 298-301.

Standard Salt and Cement Co. v. National Surety Co., 134 Minn. 121-125, citing *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, in which opinion *Grant v. Berrisford*, 94 Minn. 45, was considered.

Park v. City of Duluth, 134 Minn. 296-299.

Markley v. St. Paul, 142 Minn. 356.

In the last named case the Court said:

"The power thus given embraces any subject appropriate to the orderly conduct of municipal affairs."

Appellant challenges the decision of the trial Court determining that there is a valid and subsisting contract between the City of St. Cloud and appellant company, covering the matter of a maximum rate for fuel gas, and in support of its argument asserts that the cases of *Home Telephone Company v. City of Los Angeles*, 211 U. S. 265; *City of San Antonio, et al. v. San Antonio Public Service Company*, 255 U. S. 547, and *Southern Iowa Electric Co. v. City of Chariton*, and *Iowa Electric Company v. Fairfield*, and *Muscatine Lighting Company v. Muscatine*, 255 U. S. 539, are controlling and decisive in the case at bar.

In the Los Angeles case the charter of the city—

> "'. . . . gave to the council the power by ordinance . . . to regulate telephone service and the use of telephones within the city . . . and to fix and determine the charges for telephones and telephone services and connections.'"

This Court said:

> "It is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an 'ordinance to fix and determine the charges.' It authorizes the ex-

> ercise of the governmental power, and nothing else. We find no other provision in the charter, which, by any possibility, can be held to authorize a contract upon this important and vital subject."

No California decision holding that the terms of the Los Angeles charter, or similar charter provisions, constitute a contract, could be cited.

In the San Antonio case, a provision of the constitution of the State of Texas was held controlling which provision reads as follows:

> "No irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof."

The provisions of the Texas constitution, are fundamentally different from those of Minnesota, as the latter have been interpreted by the Minnesota Supreme Court.

In the Iowa cases, the ordinance considered contained a schedule of maximum rates to be charged for electric current furnished to consumers.

Section 725, Iowa Code of 1897, provided as follows:

> "Sec. 725. Regulation of Rates and Service. —They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, water, light, or power and to supply said city or town with water for fire protection, and with gas, water,

> light, or power for other necessary public purposes (and to regulate and fix the rent or rates for water, gas, heat, and electric light or power) * * * and these powers shall not be abridged by ordinance, resolution, or contract."

Many Supreme Court decisions of Iowa, declaring municipalities to be without power, either by ordinance, resolution, or contract, to fix the charges of public service corporations, are referred to in the decision. Iowa, dealing with a type of Iowa municipal contracts, thus preliminarily settled the question for herself. This Court adhered to the final determination of the question, as found in these Iowa cases.

At the time of the passage of the St. Cloud ordinance, Minnesota statutory provisions were radically different from those of Iowa. They provided, among other things, as follows:

> " * * * and every such corporation (public service corporation), obtaining a franchise from a city or village shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality." (Sec. 6137, G. S. 1913, Chapter 19, Laws of 1895.)

Moreover, the legislature of Minnesota has never recalled, or suspended the power delegated to Appelle City under its special charters. They stand today, supplanted merely by the Home Rule Charter of the City, adopted November 28, 1911, and containing at Subdivision 10, of Section 74, Chapter 6, identically the same powers as those bestowed

by the special charters, with the exception that the present granting of public service franchises shall be subject to ratification by the voters of the city. This added condition was imposed by State legislation in respect to Home Rule Charters, as found in Section 1347, G. S. 1913.

The Minnesota District Court, after a comprehensive review of the constitutional provisions, legislation, and decisions of both the Supreme and Federal Courts of Minnesota, declared that the exercise, by Appellee, of its power, under its charter, to make the contract in question, was in harmony with, and was sustained by, the settled public policy of the state.

We shall endeavor, under our next point, to present these decisions and briefly consider the same.

The Federal Court of South Dakota, in the recent case of *Water, Light and Power Company v. City of Hot Springs, S. D.*, 274 Fed. 827, has held valid a franchise ordinance of the defendant city, which contained a maximum rate for electrical service, although the constitution of the State of South Dakota provides:

> "No * * * law * * * making any irrevocable grant of privilege, franchise or immunity shall be passed."

The Court refers to the decision of the Circuit Court of Appeals of the Eighth Circuit, in the case of *Omaha Water Company v. City of Omaha*, 147 Fed. 1; 77 C. C. A. 267, holding that a contract for gas or water creates no special privilege or im-

munity contravening such constitutional provision.

The Court held:

> "In the case at bar these franchises do fix a maximum rate, and are contracts, because the franchises themselves do not reserve to the city future control of rates to be charged for service, nor do the statutes or constitution of the State of South Dakota, under which the defendant acted in granting the franchises, reserve to the city future control over such rates, nor is there any power in the statutes, as they then existed, given to the city to change these rates. The relation between the plaintiff and defendant was, and is, therefore, contractual, and such a contract cannot be impaired by an amendment of the laws or of the constitution."

The following clear statement is found in another South Dakota case referred to in the last mentioned opinion. The case referred to is that of *City of Watertown v. Watertown Light and Power Company*, 42 S. D. 220; 173 N. W. 739, in which reference is made to the two classes of power residing in a municipality—one, purely governmental in its nature; the other, partaking of administrative or business nature. The same distinction is drawn by Judge Sanborn in the Omaha Water Company case in this circuit.

The Supreme Court of South Dakota say:

> "To the first of these belongs the police power, and in the exercise of such police power a city council can in no manner bind its successors, but a city has full power, when authorized either by the Constitution of the state or by legislative enactment, to contract for the rendering of public service by individuals or

private corporations, and in such contract fix the rates to be charged for such service. The granting of a franchise fixing a maximum rate is a contract, and, when the franchise itself does not reserve to the city future control of the rates to be charged for service, or the Constitution or statute under which the city acted in granting the franchise does not reserve to such city future control over such rates, including the power to change same, such franchise becomes a binding contract, no more subject to impairment than would be the contract of individuals."

POINT 3.

THE DECISIONS OF THE SUPREME COURT OF MINNESOTA, AND OF THE FEDERAL COURTS SITTING THEREIN, COUPLED WITH THE PROVISIONS OF APPELLEE'S CHARTER, SUSTAIN THE VALIDITY OF THE CONTRACTUAL ORDINANCE. THESE DECISIONS CLEARLY SETTLE THE CONSTRUCTION TO BE PLACED UPON THE MAXIMUM RATE PROVISION CONTAINED IN ORDINANCE NO. 160.

Decisions of the Supreme Court of Minnesota.

Reed v. City of Anoka, 85 Minnesota, 294.

This action was brought by freeholders and taxpayers of the City of Anoka, against the City of Anoka and its officers and Anoka Water Works, Electric Light and Power Company, for the cancellation of certain contracts between the city and

the company. The City of Anoka, organized as a municipal corporation by Special Laws of 1889, Chapter 9, entered into two franchise contracts with the predecessor in interest of the company, one thereof providing for the construction and equipment within the city, of a system of water works for the supply of water to its inhabitants, and for the use of the city, and the other thereof, providing for the establishment and operation of an electric light plant, for the supplying of current to the city and its inhabitants, Both were long term contracts, extending for a period of thirty-one years. The plants were constructed and equipped and put in operation as provided by the franchise contracts.

Limitations in the form of maximum rates were imposed by the ordinance with respect to charges to be made by the grantees, to the inhabitants of the city, for water furnished them. The franchise contract providing for electric lighting, contained no limitations as to rates to be charged private customers.

The Court, in its opinion, uses the following language:

> "The authority under which the city acted in entering into the contracts is found in the provisions of its charter, which, among other things, confer upon the municipality in substance: (a) Power to make and establish public pumps, wells, cisterns, and hydrants, and to provide for and control the erection of water works for the supply of water for the city and its inhabitants; (b) power to provide for lighting the city with electricity, gas or

other means, and to control the erection of any works for that purpose, and to grant to any corporation or person the right to occupy its streets for that purpose. There can be no doubt but that these charter provisions confer upon the municipality authority to enter into contracts with individuals for the purpose of providing itself and its inhabitants with a supply of water, and for the purpose of lighting the city.

(Citation of authorities omitted.) * * *

We do not understand appellants to contend that the charter provisions are insufficient to authorize contracts for the purposes stated. What they do contend is that the contracts are void on their face because and for the reason that they cover a term of thirty-one years, and definitely and finally fix and determine the rates of compensation to be paid the grantees for the full period, and thus in effect, barter and contract away legislative functions of the municipality; it being claimed in this behalf that the right to fix rates and charges to be paid for water and light furnished by the grantees under the contracts is purely legislative, and that the city council which entered into the contracts could create no binding obligation in respect to such charges and compensation to extend beyond the term of their office.

The argument is that, though the general right and power to contract does not necessarily involve the exercise of legislative functions, the power to fix rates and charges to be paid by the municipality in consideration of the performance of contracts, does, and that, in consequence, any regulation one council might see fit to make on that subject could be binding in no proper view of the law, upon a succeeding council. The reasoning to support this position is not tenable, and to adopt it as the

law would effectually destroy, or at least render merely nominal, the right of municipalities to enter into contracts of this character, however great their necessities. Large investments of capital, such as are necessary in the equipment of plants of the nature and extent of those involved in the case at bar, could not be induced to venture in such undertakings if it were understood that the income and profits of the enterprise were at the whim and caprice of each succeeding municipal council. Such investments, where made, are permanent in character, and no prudent person would make them under such uncertain and precarious conditions as appellant's theory of the law might result in.

* * * It would be extremely illogical to hold that such contracts could be lawfully made and entered into, provided that they did not extend in duration beyond the term of office of the council by which they were made, and would tend to render the exercise of the power by the municipalities practically valueless. * * * Clearly the court could not interfere and set aside the contracts merely because they fix rates and charges beyond the term of office of the council fixing them. The most the court could do in any such case would be to hold that each succeeding council could, in the exercise of its discretionary powers, by ordinance or resolution, revise the rates previously fixed. BUT SUCH CANNOT BE HELD TO BE THE LAW. To so hold would result in overturning contracts heretofore made in good faith, upon which large investments of capital have been made, and place those who have thus invested their money at the mercy of public agitation and clamor. * * * Our conclusion is that the action was properly dismissed by the learned trial court. We may

say, in passing, that these identical contracts were sustained by the United States Circuit Court (Lochren, J.) in the case of *Anoka Water Works, E. L. P. & Co. v. City of Anoka* (C. C.) 109 Fed., 580."

The trial Court said:

"The parallelism between the Reed case and the case at bar is striking. The charter provisions are essentially the same as to the power of the Cities. The ordinance provisions are essentially the same as to the grant of franchises, as to a long time period and as to a maximum charge for service.

The Reed case, in my judgment, is conclusive as to the construction to be placed upon the charter of the defendant city and its power to make the contract in question; also, as to the construction to be placed upon the maximum rate provision contained in the contractual franchise ordinance." (Page 160.)

City of St. Cloud v. Water, Light & Power Co., 88 Minnesota, 329.

In the year 1887, the city council of St. Cloud passed an ordinance providing for the sale of the water works, then owned by the city, and also granting the right to maintain and operate the system in the city and providing for the furnishing and supplying the inhabitants of the city with three million gallons per day of pure water, suitable for domestic, manufacturing and fire purposes, *at certain specified rates*. The franchise contract was to run for the period of thirty years. The action was commenced for the purpose of cancelling and annulling the franchise and privileges granted by

the ordinance, and to set aside and annul the contract thereby entered into upon the ground that the grantees and their successors had failed to carry out their contract to furnish pure water in the specified quantities.

In 1887, the existing provisions of the charter of the city were much more scant than those contained in the consolidated charter of 1889, to which reference has been made under Point One of this brief.

The Supreme Court held that the obligations thus entered into, as set out in the ordinance, were mutual and constituted a contract.

The Court say:

> "The obligations of the parties, as set out in the ordinance, constitute a contract. The city was enabled to enter into such obligation by virtue of its charter powers and the general laws of the state, and was endowed with the right to construct, or cause to be constructed, a water system for the benefit of its inhabitants, and had control of its streets and could contract with reference to their use, for the purpose of extending the system. In the exercise of such power, the city entered into a contract, and granted the privilege of operating and maintaining a system of waterworks within its streets, for the period of thirty years, and the right to furnish water to its inhabitants at certain specified rates. * * * The obligations thus entered into were mutual."

The contract was sustained and the water company given opportunity to comply with its terms.

Flynn v. Little Falls Electric and Water Co., 74 Minn. 180.

The present City of Little Falls was first organized as a village under Minnesota Special Laws of 1879, Chapter 6, "with the power to establish such regulations for the prevention and extinguishment of fires as it might deem expedient."

Little Falls was incorporated as a village under the provisions of the Laws of 1885, Chapter 145. Sub. 10, Sec. 21, Laws of 1885, empowered the village,—

> "To establish a fire department, to appoint the officers and members thereof, and prescribe and regulate their duties; to provide protection from fire by the purchase of fire engines and all necessary apparatus for the extinguishment of fires, and by the erection or construction of pumps, water mains, reservoirs, or other waterworks. * * *"

In January, 1889, the Village Council passed an ordinance granting to certain persons, their successors or assigns, for thirty years, the privilege of laying mains in the streets, and contracting to pay for each hydrant, 55 in number, the sum of $80.00 per year, for the full term of thirty years. The ordinance was accepted by the grantees. The waterworks were constructed and put in operation, and the water company complied with the terms and conditions of the contractual ordinance.

The Court say:

> "The vice, if any, of this ordinance, viewed as a contract, consists mainly, if not entirely, in the length of time for which it bound the

city to pay annually this sum of $4,400.00 for fire hydrants. The number of hydrants, the price to be paid per hydrant, and the other provisions of the ordinance, are chiefly important insofar as they bear upon the question of the power of the village or city council to bind the city for so long a period of time. *We have no doubt as to their power to contract with this, or any other water company, with reference to furnishing the city and its inhabitants with water.*"

City of Red Wing v. Wisconsin-Minnesota Light and Power Company, 139 Minnesota, 240.

In the year 1872, certain persons obtained an exclusive franchise from the City of Red Wing to establish a gas plant therein and for the laying of certain pipes or mains in its streets, for the purpose of supplying the city and its inhabitants with gas. The duration of the franchise was forty years, with an additional period of twenty years, unless the city elected to buy the plant. Defendant succeeded to the ownership of the plant.

The franchise ordinance was contractual. The ordinance provided for fixed prices for gas for specified periods of time, to be changed only by agreement of the parties, or, in the event that they could not agree, then by resort to the arbitration provided for by the terms of the ordinance. Attempt was made by the Company to increase gas rates without the consent of the City Council and without resort to the stipulated arbitration. The Company was restrained from putting such increased gas rates into effect, and the decision of the trial

Court was affirmed by the Supreme Court, upon appeal.

The only charter power possessed by Red Wing, referring to the contract matter involved, consisted of authority to—

> "erect lamps or other means whereby to light the city."

The Court say:

> "The rights of the litigants are based solely upon the contract evidenced by the ordinance, and not upon any rate making power delegated to the city. It is not questioned and could not well be, that in a franchise ordinance rates and the manner of fixing them, both for the city and its inhabitants, could be provided for, subject to the right of subsequent legislative interference. * * *
>
> There is no intimation of lack of authority in the city council to grant the franchise here involved. It is manifest that, in granting the same, benefits and privileges were intended to be secured not only to the municipality itself, but to its inhabitants as well, that is, to those who in the future might desire to use gas. Hence, naturally we look for provisions in the franchise guarding or protecting all consumers against an arbitrary fixing of gas prices by defendant. * * *
>
> The city of Red Wing represented not only the municipality but also its several inhabitants in making this franchise contract. And in bringing this action to enforce that contract as to a provision thereof which defendant repudiates, while holding on to the others, the city acts not only as a municipality but as a sort of trustee for its inhabitants."

In the absence of practically all specific charter power, this contract was sustained as binding both parties, subject only "to the right of subsequent legislative interference."

This case was cited with approval by the Supreme Court in the case of *City of Duluth v. Duluth Street Railway*, 145 Minnesota, 55.

DECISIONS OF FEDERAL COURTS SITTING IN MINNESOTA.

Anoka Waterworks, Electric Light & Power Co. v. City of Anoka, 109 Fed. 580.

Suit to enforce contract rights under ordinances passed by the City of Anoka in 1889, and to set aside, as invalid, certain ordinances purporting to repeal those creating the contracts. One of these franchise ordinances provided for the construction and maintenance of waterworks, for supplying the City and its inhabitants. The other ordinance provided for furnishing electric lights to the city and its inhabitants. The term of each franchise was thirty-one years. In the ordinances, the City agreed to pay certain rates and rentals; and in one of the ordinances maximum rates were fixed for private consumers.

In February, 1899, the city council passed a series of five ordinances, purporting to repeal, in detail, all of the ordinances of 1889, constituting said contract.

In the case at bar, the trial Court sets out at length, at pages 156-159 of the record, the provi-

sions of the Special Laws of 1889, Chapter 9, containing the grants of power to the City of Anoka, and also the material provisions of the ordinances in question, to which we respectfully refer.

As to maximum rates for service, during the continuance of the franchise, particular attention is called to the language of Section 6 of Ordinance 73, quoted in the decision, at page 158 of the record.

The Court said:

> "The contracts entered into by the defendant City, by and through the said ordinances of 1889, and acceptances of the same, were valid and binding. The city had full power to enter into such contracts under the provisions of Chapter 4 of its charter, quoted in its answer:
>
> "To provide for and conduct water into and through the streets, lanes, alleys and public grounds of said city, and to provide for and control the erection of waterworks for the supply of water for said city and its inhabitants."
>
> "To provide for the lighting of said city by electricity, gas, or other means; and to control the erection of any works for the lighting of said city."

Franchise ordinances held to be valid and existing contracts, and repealing ordinances held to be invalid and of no effect.

> *Fergus Falls Water Co. v. City of Fergus Falls,* 65 Fed. 586.

Exclusive franchise grant for the period of thirty years to lay water mains in the city and furnish the city with water from fifty hydrants, at the rate of $80.00 each per annum. Action by the Com-

pany to recover on the franchise contract for the water rentals. Claimed by the city that the ordinance was void, for the reason that the City Council had no authority to bind the defendant for such a period in advance.

The charter of the city provided that the City Council shall have power—

> "To contract with any person, persons or corporation, for the laying of mains in such streets, or parts of streets and public places as the City shall deem proper, for the convenience and safety of the inhabitants, also for supplying the city with water."

The Court, in sustaining the validity of the ordinance, said:

> "It is evident that the passage of the first ordinance, of August 30, 1893, was brought about by the fact that instead of growing, as was expected, the city had decreased in population and assessable valuation. The law does not favor the idea that a man shall abide by a contract when it is advantageous to him, and repudiate it when it becomes irksome. It is well settled that time and even exclusive contracts may be made by city authorities for the purpose of inducing persons to embark capital in such enterprises as water or gas works, and common sense and experience teach us that without such provisions capital would not be invested. The only question is, is this ordinance so unreasonable, so oppressive, so contrary to public policy that the law will interfere and declare it void? I am of opinion that, if this question had been raised at the outset, it is doubtful whether the city council had authority to give an exclusive contract of this character to any person for the purpose stated;

but as plaintiff's assignor, relying upon the ordinance, in good faith invested a large sum of money in these works, and the city has for 10 years enjoyed the benefits thereof without objection or complaint, and has now the opportunity of purchasing the works at a reasonable valuation, commensurate with the productive value thereof, I do not consider that the ordinance is so unreasonable, oppressive, or contrary to public policy as to be void. Where a contract is sought to be avoided on the grounds above stated, it must be treated as a nullity by the party seeking to avoid it, and must be repudiated *in toto*. He cannot repudiate it, and at the same time reap any benefits derived from it, as the defendant has attempted to do."

City of Moorhead v. Union Light, Heat and Power Co., 255 Fed. 920.

Plaintiff, the City of Moorhead is a municipal corporation operating under a Home Rule Charter adopted by its people March 22, 1900. The charter of the City (Section 223) provided that every ordinance by which the council shall propose to grant any franchise shall contain all the terms and conditions of the franchise, and "it shall be a feature of every franchise so granted that the maximum price of the service shall be stated in the grant * * *."

On May 6, 1912, an ordinance granting the defendant a franchise for the purpose of conducting its gas business for the term of ten years within the city, was adopted by a majority of the voters of the city. The ordinance was accepted by the grantee.

Section 6 of this ordinance fixed the maximum price of gas "at not to exceed $1.80 per thousand

cubic feet, for illuminating, and $1.45 per thousand cubic feet for fuel purposes."

Defendant served on the City of Moorhead notice that the rates for gas, after a certain date, would be increased beyond the maximum rate fixed by the ordinance, claiming that, due to the conditions following the European War, all of the elements entering into the cost of manufacturing and distributing gas had so greatly increased that it could not supply gas at the rates fixed by the ordinance, except at an actual loss.

Action was instituted to restrain the company from violating the contract ordinance. The defendant filed an answer and cross-bill, asking for relief from the terms of the contract ordinance fixing the maximum price of gas. Plaintiff moved that the cross-bill be dismissed, upon the ground that it stated no facts entitling the defendant to relief in equity. Defendant's cross-bill was dismissed for want of equity.

The Court said:

> "It is conceded in argument that the rule in the Federal Courts in actions at law is that a party is bound by his contract, though performance results in loss. That is settled by the Court of Appeals of this circuit in the recent case of *Berg v. Erickson*, 234 Fed. 817, 148 C. C. A. 415, L. R. A. 1917 A. 648. From a careful review of the authorities Judge Sanborn there states that in some of the State Courts a rule has been developed that, when conditions arise of such a character that the Court can see that they were not within the contemplation of the parties at the time the contract was made, such a change of situation will

excuse a violation of the contract He concludes, however, as follows:

'But no decision of the Supreme Court or of any Federal Court to this effect has been sought or discovered which goes so far, and the rule adopted by the Supreme Court, which must prevail here, is otherwise.'"

The Court further said:

"The situation disclosed by the cross-bill, if it is a true picture of the actual effect of the rates upon defendant's business, is such as might lead a just man in private life to modify a contract. It is within the power of the city council to modify a contract. In states having a public utility commission vested with full authority to deal with the subject of rates, such, for example, as Massachusetts, New York, Wisconsin, and California, those commissions have exercised their powers to increase rates when they were unreasonably low, just as freely as to reduce them when they were unreasonably high. Unfortunately there is no commission in the State of Minnesota clothed with such a power. The same is true in North Dakota. A commission which is powerless to protect the public is also powerless to protect the company. Relief against such a situation, however, can be found only in the Legislature, and will not justify Courts in assuming legislative powers."

POINT 4.

IS THE LANGUAGE OF ORDINANCE NO. 160 CONTRACTUAL IN FORM, OR MERELY LEGISLATIVE?

The maximum fuel gas rate prescribed by the

ordinance was a contractual condition of the ordinance. The right given to the grantee to enter upon and occupy the streets and public places of the city, was certainly a contractual result. There was a contractual purpose entertained by the parties to the franchise agreement. The grantee, as required by the ordinance, constructed a gas plant. For fifteen years, appellant and its predecessor, enjoyed the fruits of this contract. Each party is legally estopped from denying a contract. The practical construction placed by the parties on this ordinance shows that each treated it as a contract.

The language in each section of the ordinance is contractual.

Section 1 contains a grant of right and privilege, the language being "the right and privilege is hereby granted, etc."

Section 2 states "the grantee is hereby authorized to produce, manufacture and vend, etc."

Section 3 grants access to, and right of occupation of, the streets and public grounds of the city for the purpose of making all necessary erections and excavations, with the obligation on the part of the grantee to restore same to their original condition, as far as practicable and inflict no injury upon city property.

Section 4 requires the grantee to conform to all reasonable regulations of the city.

Section 5, conceded by appellant to be contractual, provides that "In consideration of the rights and privileges herein granted, the grantee hereby covenants and agrees, etc."

Section 6 contains authority to conduct the business of the grantee in the city and contains the stipulation as to maximum rates. The language of this section is clearly contractual. The price for gas is left to the grantee's judgment, provided, however, that the price does not exceed the maximum amount stated.

Section 7 provides for the purchase by the city, at stated intervals, of the electric and gas works and business of the grantee, a part of the contractual language being as follows:

> "The rights hereby granted are upon the express condition that the city of St. Cloud may purchase, etc."

Under Point 1 we have referred to many cases in support of the proposition that the ordinance is contractual and that a contract resulted.

The following additional authority is cited:

Dillon, Vol. 3, 5th Ed., pages 2153 and 2236-7.

McQuillan, Vol. 4, page 3719.

Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 667.

Knoxville Gas Co. v. Knoxville, 253 Fed. 217.

For the reasons stated, we respectfully submit that the decree should be affirmed.

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St. Cloud, Minnesota,
Solicitor and Attorney for Appellee.